No. 83-185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, *et al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

PHYLLIS BAXTER, *et. al.*,

Petitioners,

v.

FEDERAL RESERVE BANK OF RICHMOND.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED*

Did the Court of Appeals err in holding that a prior finding that any pattern or practice of employment discrimination was not "pervasive" precludes, as a matter of res judicata, all employees from litigating any individual claims of discrimination?

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*The parties to this litigation are set out at p. ii of the Petition.

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On Writ Of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the court of appeals is reported at 698 F.2d 633, and is set out at pp. 1a-185a of the Appendix to the

Petition for Writ of Certiorari (hereinafter cited as "P.A."). The order denying rehearing, which is not yet reported, is set out at P.A. 186a. The district court's Memorandum Decision of October 30, 1980, is not reported, and is set out at P.A. 191a-96a. The district court's Findings of Fact and Conclusions of Law, which are not reported, are set out at P.A. 197a-285a. The district court orders of May 29, 1981, and February 26, 1982, which are not reported, are set forth at P.A. 286a-89a and P.A. 290a-97a respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1983. A timely Petition for Rehearing was filed, which was denied on April 6, 1983 by an equally divided court. (P.A. 186a). This Court granted an extension of time in which to

file the Petition for Writ of Certiorari until August 4, 1983. The Petition for a Writ of Certiorari was filed on August 4, 1983, and was granted on October 31, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 23(c)(3), Federal Rules of Civil Procedure, provides:

> (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

STATEMENT OF THE CASE

On March 22, 1977, the EEOC brought suit against the Federal Reserve Bank of Richmond alleging that the Bank had discriminated against black employees in making promotions at its Charlotte, North Carolina facilities, and that it had discriminated in particular against Sylvia Cooper because of her race, first by refusing to promote her to a supervisory position and then by discharging her. Jurisdiction was asserted under 42 U.S.C. § 2000e-5. (J.A. 6a-11a). On September 21, 1977, Cooper and three other present or former Bank employees (the "Cooper plaintiffs") were permitted to intervene as plaintiffs. (J.A. 12a-23a). On April 28, 1978, the district court certified a plaintiff class consisting of blacks who had been employed at the Bank's Charlotte branch since January 3, 1974, and had been

discriminated against on the basis of race. (J.A. 24a-32a).

The case was tried without a jury in September, 1980. The case was heard under the bifurcated procedure common in Title VII class actions, and expressly sanctioned by this Court in International Brotherhood of Teamsters v. United States, 431 U.S. 360 (1977). Under that procedure plaintiffs were required to establish at the September 1980 hearing that there had been a practice of classwide discrimination; if that burden were met, the identities of the particular class members who were the victims of that practice were to be resolved at a later hearing.

At the September, 1980, trial Phyllis Baxter and four other[1/] black Bank employees

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1/ Brenda Gilliam, Glenda Knott, Alfred Harrison and Sherri McCorkle. Emma Ruffin also sought to testify, but because she was in grade 4 and thus covered by the

(the "Baxter plaintiffs"), none of whom were named plaintiffs in the Cooper action, sought to testify regarding alleged acts of discrimination against them by the Bank. The defendant, however, objected to their testimony, urging the district court to rule that it would not resolve the merits of those "individual claims and that this evidence we hear just goes to their claim that there is a pattern and practice." The trial court agreed to so limit consideration of that testimony.[2/]

On October 30, 1980, the district court issued a Memorandum of Decision which

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1/ continued

trial court's finding of a pattern of discrimination against blacks in grades 4 and 5, she did not join as a plaintiff in the subsequent Baxter litigation.

2/ Trial Transcript, p. 400 (handwritten page number 340) (testimony of Sherri McCorkle.)

held that the Bank had engaged in a pattern and practice of discrimination in denying promotions to black employees in pay grades 4 and 5. (P.A. 194a). With respect to promotions of blacks in pay grades 6 and above, however, the court held:

> There does not appear to be a pattern and practice pervasive enough for the court to order relief. (P.A. 194a).

The district court concluded that two of the named plaintiffs, Sylvia Cooper and Constance Russell, both of whom were in pay grade 6 or above, had been denied promotions on the basis of race. (P.A. 192a-193a). The court's October, 1980, opinion contained no reference to the testimony or discrimination claims of Baxter or any of the other Baxter plaintiffs. The court directed counsel for the plaintiffs to propose more detailed "findings of fact and conclusions of law con-

sistent with [its] findings." (P.A. 194a).

Undaunted by the failure of their initial attempt to obtain in the Cooper litigation a decision on the merits of the claims of the Baxter plaintiffs, counsel for plaintiffs tried another approach. The district court's decision contemplated the appointment of "a special master for a Stage II proceeding[ ] to ... identify class members entitled to relief." (P.A. 195a). But the court had found classwide discrimination against only blacks in pay grades 4 and 5, and the Baxter plaintiffs were in grades 3, 6 or 7. Thus a determination as to which blacks in grades 4 and 5 were the victims of discrimination would necessarily have left still unresolved the claims of the Baxter plaintiffs. Since those Baxter plaintiffs apparently could not be represented

by Cooper in the private class action, counsel for plaintiffs urged, in their Proposed Findings of Fact and Conclusions of Law, that the EEOC instead be permitted to press the claims of those employees at the stage II proceeding.[3/] On February 27, 1981, however, the defendant filed a response strenuously objecting to this proposal.[4/]

3/ Paragraph 27 of the Proposed Conclusions of Law read in part:

> The Court is of the opinion ... that ... the Master should receive evidence and make recommendations with respect to Phyllis Baxter, Brenda Gilliam, Glenda Knott, Alfred Harrison and Sherri McCorkle.... They are within the scope of [the] individuals who have claims which may appropriately be pursued by EEOC.

This proposed Conclusion was not adopted by the trial court. See P.A. 283a.

4/ Defendant's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, pp. 8-10, 14, 18.

While this proposal for EEOC representation was still pending, counsel for plaintiffs made yet a third attempt to obtain in the Cooper litigation a resolution of the merits of the Baxter claims. On March 24, 1981, the Baxter plaintiffs moved to intervene as individuals in the Cooper litigation. (J.A. 39a-51a). The proposed complaint in intervention asserted that each of the Baxter plaintiffs had been denied a promotion as a result of racial discrimination, but did not allege that there was any general practice of discrimination against blacks in pay grades 6 and above. The defendant bank opposed this motion, insisting that if the Baxter plaintiffs wished to pursue their individual claims they could and should file a separate lawsuit.[5/] The district court

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5/ See pp. 57-58, infra.

agreed, and at a hearing on May 8, 1981, denied from the bench the motion to intervene;[6/] the court also indicated that it would not permit the EEOC to represent the Baxter plaintiffs in the Cooper litigation.[7/]

Four days later, on May 12, 1981, the Baxter plaintiffs, following the suggestion of the district court and the defendant, filed a civil action alleging racial discrimination in employment in violation of 42 U.S.C. § 1981. On May 29, 1981, the district judge entered a written order formally denying the motion to intervene in Cooper, emphasizing, "I see no reason why, if any of the would be intervenors are

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6/ Transcript of Hearing of May 8, 1981, pp. 17-18. That decision was memorialized in an order of May 29, 1981. (P.A. 286a-289a).

7/ Transcript of Hearing of May 8, 1981, p. 19.

actively interested in pursuing their claims, they cannot file a Section 1981 suit next week...." (P.A. 291a). On the same day the judge issued his Findings of Fact and Conclusions of Law, which formally rejected the proposal to permit the EEOC to pursue in the Cooper litigation the claims of the Baxter plaintiffs.

Having thus succeeded in thwarting three different attempts to obtain in the Cooper litigation a resolution of the claims of the Baxter plaintiffs, the defendant Bank moved on July 2, 1981, to dismiss the Baxter claims, asserting that they were "barred by res judicata" because of the decision in Cooper. (J.A. 71a et seq.). On February 26, 1982, the district court denied the motion to dismiss. (P.A. 290a). The district judge, however, entered the findings necessary to permit the defendant to appeal from its

decision pursuant to 28 U.S.C. § 1292(a). The court of appeals granted the defendant leave to take such an appeal.

On January 11, 1983, the court of appeals reversed the district court's decision in Baxter. The Fourth Circuit did not suggest that the trial court had implicitly considered and resolved the conflicting contentions regarding the specific claims of the Baxter plaintiffs; it reasoned, rather, that the lack of a finding of classwide discrimination involving grades 6 and above barred as a matter of res judicata any consideration of the particular claims of blacks in those grades:

> They ... are ... precluded by the determination of the District Court that there was no discrimination in promotion out of pay grades above pay grade 5.... (P.A. 179a).

One of the Baxter plaintiffs, Alfred Harrison, was in pay grade 3. Neither the

district court's Memorandum of Decision nor its Findings of Fact and Conclusions of Law even considered whether there was class wide discrimination regarding promotions out of grade 3. The court of appeals nonetheless held that Harrison's claim too was barred by res judicata. The district court had found a practice of discrimination in promotions from grades 4 and 5, and the court of appeals overturned that determination:

> We ... reverse the District Court's Findings and Conclusions of class discrimination in promotions out of grades 4 and 5.... (P.A. 129a).

The court of appeals, nominally relying on this conclusion, held that Harrison's claim was

> precluded by our determination on this appeal that there was no practice of discrimination in pay grade 5 and below. (P.A. 179a) (Emphasis added).

In fact the decision of the court of appeals on the class claims, like that of

the district court, referred only to grades 4 and 5, and was devoid of any discussion of whether there was classwide discrimination against blacks in pay grade 3. Upon consideration of the Baxter plaintiffs' Petition for Rehearing and Suggestion for Rehearing En Banc, the panel's decision was upheld by an equally divided (4-4) court. (P.A. 188a).

SUMMARY OF ARGUMENT

I. The question presented by this case is not whether a judgment on the merits of a particular issue in a class action ordinarily precludes members of the class from relitigating that specific issue. Petitioners acknowledge the correctness of that principle. The problem here is to ascertain what the district court in fact decided.

II.(1) The district court in the Cooper litigation neither considered nor resolved the merits of the individual claims of the Baxter plaintiffs.

The trial in Cooper was a limited stage I proceeding whose purpose was to determine whether there was a practice of classwide discrimination. The district court concluded regarding discrimination in pay grades 6 and above that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." (P.A. 194a). That finding does not preclude the possibility that there were particular acts of discrimination against the Baxter plaintiffs in grades 6 and above. This Court has repeatedly recognized that even in the absence of classwide discrimination there may be "isolated or 'accidental' or sporadic discriminatory acts.'" Teamsters v.

United States, 431 U.S. 324, 336 (1977).

The trial judge in Cooper repeatedly refused to consider and resolve the claims of the Baxter plaintiffs. When the Baxter plaintiffs sought to testify at the Cooper trials, the judge accepted a defense proposal that the court not "rule on individual claims." The district court refused to permit the EEOC to present the claims of the Baxter plaintiffs in the Cooper litigation, and rejected an attempt by the Baxter plaintiffs to actually intervene in Cooper. Thus the Baxter plaintiffs never had in Cooper "a 'full and fair opportunity' to litigate [their] claims.'" Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982).

The decision of the court of appeals appears to hold that the failure of the district court to decide the merits of the individual Baxter plaintiffs in the Cooper

class action somehow precludes the Baxter plaintiffs from bringing a second action. Such a rule would be inconsistent with the established principle that res judicata only bars claims previously resolved "on the merits." Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n.6 (1982).

(2) Res judicata does not apply where the judge who issued the first decision expressly reserved the right of the plaintiffs to bring a second action. At the hearing on the Baxter plaintiffs' motion to intervene in Cooper, the district judge announced:

> I'm going to deny the motion without prejudice to the individual rights of the four would be intervenors to maintain a separate action. 8/

The court's written order denying that motion reiterated:

8/ See p. 60, infra.

> I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. (P.A. 288a).

Thus it was the clear intent of the district court in Cooper to permit the instant litigation.

The application of res judicata is particularly inappropriate since the defendant in Cooper expressly argued that Baxter could and should file her own lawsuit. In successfully opposing Baxter's motion to intervene in Cooper the Bank asserted:

> Applicants ... can still go to the EEOC office and file all the charges they desire ... therefore, there is no way there will be any prejudice to the applicants in denying their motion, since they can pursue any individual claims they have in separate proceedings. 9/

9/ See p. 61, infra.

Less than two months after insisting in Cooper that the Baxter plaintiffs could and should file their own suit, the Bank moved to dismiss that suit, arguing that it was barred by res judicata.

III. The Baxter plaintiffs are barred by collateral estoppel from litigating only those issues which were actually decided in Cooper.

The Baxter plaintiffs in pay grades 6 and above are bound by the Cooper decision that any classwide discrimination in those grades was not sufficient to warrant a classwide remedy.

One of the Baxter plaintiffs, Alfred Harrison, is in pay grade 3. Since neither court below ever considered or decided whether there was classwide discrimination in pay grade 3, Harrison should be permitted to offer proof on remand of the

existence of such a pattern and practice of discrimination.

The district court found that there had been intentional discrimination against two named plaintiffs in Cooper, Sylvia Cooper and Constance Russell, both of whom were in pay grade 6 or above. The court of appeals reversed these findings of discrimination; the court of appeals, however, apparently misunderstood the district court to have held that there was no discrimination in grades 6 and above. Accordingly, the court of appeals' decision regarding the individual claims of Cooper and Russell should be vacated and remanded.

ARGUMENT

I. THE BINDING EFFECT OF DECISIONS IN CLASS ACTIONS

The question presented by this case is not whether a judgment determining on the merits a particular issue in a class action

ordinarily[10/] precludes members of the class from relitigating that specific issue. Petitioners did not question that principle below and do not seek to do so here. The court of appeals, however, applied a far more sweeping rule, apparently assuming that an adverse determination on the merits of any single class issue precludes class members from litigating all other issues involving the same subject matter.

Prior to the 1966 amendments to Rule 23, there was in the case of a so-called "spurious" class action no procedure

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10/ The application of this principle presupposes, inter alia, that the class was in fact certified, that class members received any required notice, that the named plaintiff adequately represented the interests of the class, and that the court rendering the decision had jurisdiction to do so. See 18 C. Wright and A. Miller, Federal Practice and Procedure, § 4455 (1972); 3B Moore's Federal Practice ¶ 2360 (2d ed. 1982).

for determining prior to judgment which of the potential members of the class claimed in the complaint were actual members and would thus be bound by the judgment. A number of courts held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefit of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. In order to prevent such "one-way intervention," sections (c)(1) and (c)(2) were added to Rule 23, directing that the propriety of class certification be resolved "as soon as practicable," and requiring class members in a Rule 23(b)(3) action to decide prior to any resolution on the merits whether to remain in the class. American Pipe Construction Co. v. Utah, 414 U.S. 538, 546-9 (1974). Rule 23(c)(3)

directs the court adjudicating a class action to include in its judgment a designation of the individuals who are members of the affected class.

Rule 23 does not, however, purport to "determine the binding effect of a judgment ... [or] prescrib[e] any particular adjudicatory effect to it...."[11/] Rather, Rule 23 directs the attention of the court deciding a class action, and of any court subsequently called upon to ascertain the adjudicatory effect of that decision, to the actual language of the judgment. It is in the particular terms of the judgment that the first court is called upon to spell out what it has decided and who were the parties to that litigation, and it

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11/ 7A C. Wright and A. Miller, Federal Practice and Procedure, § 1789, p. 177 (1972).

is by those terms that the res judicata effect of the judgment must be determined. In ascertaining what issues or claims cannot be litigated because of the decision in an earlier class action, "special care may be required in identifying the issues or claims presented and in relating them to the scope of the class action." 18 C. Wright & A. Miller, Federal Practice and Procedure, § 4455, p. 473 (1972)[12/]

In a civil action on behalf of a single individual, one would ordinarily expect the plaintiff to present, and the court to resolve, all of his or her claims and contentions with regard to a

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12/ See also F. James, Jr. & G. Hazard, Jr., Civil Procedure, § 11.28, p. 587 (2d ed. 1977) ("[T]he very nature of a class suit requires that the rules of res judicata be applied to it with special caution.")

particular subject matter or transaction. In certain instances an individual plaintiff may be required to do so. But in determining the scope of the decision in a class action the courts cannot indulge in any assumption that every possible claim against the defendant of each and every class member was in fact litigated and decided. A claim of a particular class member, or an issue or fact relevant to that claim, is not ordinarily adjudicated in a class action unless the claim or question is common to both the class and the named plaintiff, and unless that named plaintiff is in a position to "fairly and adequately protect the interests of the class." Rule 23(a). Rule 23(b) poses yet additional limitations regarding what claims and issues may in fact be litigated in a class action. "The mere fact that an aggrieved private plaintiff is a member of

an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer." General Telephone Co. v. Falcon, 457 U.S. 147, 159 n. 15. (1982) (emphasis added) In sum, while an individual plaintiff ordinarily would not, and under some circumstances could not, pick and choose among the related claims and issues to present in a single lawsuit, "careful attention to the requirements of ... Rule ... 23" requires just such selectivity in the choice of questions to be resolved in a class action. East Texas Motor Freight v. Rodriquez, 431 U.S. 395, 405 (1977).

Those matters which a court declines to actually resolve in a class action of course remain open for litigation in some future action. The same is true of issues

which counsel for the representative party, mindful of the requirements of Rule 23 and of the problems of manageability associated with any class action, declines to present or press for resolution. Falcon neither encourages nor requires the class representative to plead the broadest conceivable class claim and force the court to reduce it to a more manageable suit consonant with Rule 23. If the defendant in a class action believes that the membership of the proposed class or the scope of the proposed class claims are too narrowly defined, it is free to urge the trial court to expand or alter either. But a defendant dissatisfied with the class definition or the claims offered by a plaintiff cannot withhold its objection and later complain that other issues should have been litigated or that other individuals should have

been members of the class.[13/]

Ascertaining precisely what issues were in fact litigated and resolved in a class action will not always be a simple task. The mere fact that a complaint alleges a wide variety of claims does not itself ensure that the representative party could or did in fact litigate all or most of them at trial. Cf. East Texas Motor

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13/ "The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought for the relief demanded in the class action. An individual who has suffered particular injury as a result of practices enjoined in a class action, for instance, should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief." 18 C. Wright & A. Miller, Federal Practice and Procedure, §4455, p. 474 (1972).

Freight v. Rodriguez, 431 U.S. 395, 405-06 (1977). In some instances limitations on the claims or issues actually presented and resolved in a class action may be apparent on the face of the complaint itself. See, e.g., Bogard v. Cook, 586 F.2d 399 (5th Cir. 1978) (individual action for damages not barred by earlier class action seeking only injunctive relief).[14/] The terms of the trial court's decision or order regarding certification may define the class issues more narrowly than the complaint itself. See e.g., Woodson v. Fulton, 614 F.2d 940, 942 (4th Cir. 1980) (certification decision excluded claims regarding discriminatory discharge). In

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14/ In sustaining that individual action, the Fifth Circuit noted that it had "no way of knowing that [the earlier suit] would have been manageable as a class action if individual damage relief had been requested." 586 F.2d at 408.

the instant case, for example, the Cooper complaint alleged a general practice of discrimination on the basis of both race and sex (J.A. 15a), but the certification order limited the class claim to discrimination on the basis of race. (J.A. 27a). The scope of the issues or claims actually litigated at trial may be narrower still. See, e.g., Marshall v. Kirkland, 602 F.2d 1282, 1298 (8th Cir. 1979) (decision on class claim not res judicata as to class members whose claims were not in fact presented to the trial court). The opinion and judgment of the district court must be carefully scrutinized to ascertain whether each of the class claims or issues presented at trial was in fact resolved by the court on the merits.

The possibility that a trial court will not in fact resolve all the issues a plaintiff seeks to litigate is particularly

real when, as is often the case in Rule 23(b)(3) class actions, the court uses the familiar device of a split trial. See Frankel, "Some Preliminary Observations Concerning Civil Rule 23," 43 F.R.D. 39, 47 (1967). Such bifurcated proceedings are particularly common in the trial court of complex Title VII class actions. In such cases

> [a]t the initial, "liability" stage ... [the plaintiff] is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a prima facie case that such a policy existed.... [A] district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of the individual relief.... [T]he question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 360-62 (1977). Should a trial court conclude in such a

case that there was no classwide discrimination, it would ordinarily have no occasion to consider at any later proceeding whether particular individuals might nonetheless have been the victims of isolated acts of discrimination. Just as the courts cannot assume that, if a class is certified, "all will be well for surely the plaintiff will win and manna will fall on all members of the class," General Telephone v. Falcon, 457 U.S. at 161, so too they cannot assume that every claim somehow relevant to the plaintiffs' complaint will in fact be litigated and resolved on the merits.

II. THE BAXTER CLAIMS ARE NOT BARRED BY RES JUDICATA

(1) The District Court in Cooper Did Not Decide The Merits of the Baxter Claims

A final judgment on the merits of a claim precludes the parties, including

class members, from relitigating that claim. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). But this principle of res judicata does not apply to all cases in which a party fails to obtain the relief it sought in the initial litigation; only if that denial of relief was based on a decision on the merits of the claim is the unsuccessful party thereafter precluded from litigating the same claim. "If the first suit was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." Costello v. United States, 365 U.S. 265, 286 (1961); see Restatement of Judgments 2d, § 20 (1982). This Court has repeatedly declined to give such preclusive effect to decisions which failed to resolve the merits of a

disputed claim.[15/] A finding that some earlier action did resolve the merits of a claim, like any application of res judicata, must be made "only after careful scrutiny." Brown v. Felsen, 442 U.S. 127, 132 (1979).

There is no question that the Baxter plaintiffs wanted and repeatedly attempted to litigate their individual claims in the Cooper action. It is equally clear, however, that the defendants successfully prevented them from doing so. Although the Baxter plaintiffs were permitted to testify at the Cooper trial, the defendant insisted that the district court not resolve their individual claims, but consider their testimony only insofar as it tended to

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15/ Costello v. United States, 365 U.S. 765 (1961); Hughes v. United States, 71 U.S. (4 Wall.) 232 (1866); Gilman v. Rives, 35 U.S. (10 Pet.) 298 (1836).

establish the existence of classwide discrimination. This distinction was made when the first Baxter plaintiff was called to the stand:

> [DEFENSE COUNSEL]: ... My understanding now is that, except for [Cooper and the three other named plaintiffs], you won't rule on individual claims and that this evidence we hear just goes to their claim that there is a pattern and practice.
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> * * *
>
> THE COURT: ... I think the answer to your question is that is correct. The only people as to whose rights the Court has a duty to make a present decision are the four persons named who have themselves asserted in this case a personal right to recovery. 16/

Following the district court's initial Memorandum of Decision, which apparently precluded Cooper from representing the interests of the Baxter plaintiffs at the Stage II proceedings, counsel for plain-

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16/ See n.2, supra.

tiffs suggested that the EEOC be permitted to present in those proceedings the individual claims of the Baxter plaintiffs. (See p. 9, supra). The defendant again objected:

> The defendant submits that those witnesses are not entitled to participate in Stage II proceedings. The people in question testified at trial, but had not participated in the action other than as passive class members. Their testimony was on the issue of class liability, although their testimony focused on personal grievances. These people are not parties [and] they are not intervenors.... 17/

The trial court upheld the defendant's argument that the EEOC should not be permitted to pursue the Baxter claims.[18/] Finally, the Baxter plaintiffs attempted to intervene in the Cooper litigation in order

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17/ Defendant's Response to Plaintiffs' Proposed Findings of Fact and Conclusions of Law, p. 8. (Emphasis in original).

18/ See p. 11, supra.

to present their individual claims for adjudication at the Stage II proceedings. The defendant successfully opposed this attempt as well. (P.A. 286a-289a). Far from having in Cooper "a 'full and fair opportunity' to litigate [their] claim," Kremer v. Chemical Construction Corp., 456 U.S. 461, 480 (1982), the Baxter plaintiffs in fact had no opportunity whatever to do so in that case.

It is also clear that the trial court did not in fact decide the individual claims of the Baxter plaintiffs. Phyllis Baxter, for example, alleged that on several occasions between 1975 and 1978 she applied for certain vacancies, "but was denied the positions beause of her race and color". (P.A. 66a). Plaintiff Gilliam contended that she was denied promotion to a junior Computer Console position in November of 1976 because of racial dis-

crimination. Plaintiffs Knott, Harrison and McCorkle made equally specific claims about denials of promotions to particular vacancies. (Id.) Neither the district court's Memorandum of Decision (P.A. 191a) nor the Judgment (P.A. 52a-62a) contain any reference whatever to Baxter, Gilliam, Knott, Harrison, or McCorkle. The lower court's Findings of Fact and Conclusions of Law describe the claims of the Baxter plaintiffs, noting that in general they were fully qualified for the promotions they sought and often more experienced than the whites who were actually appointed to the positions involved. (P.A. 247a-254a). But nowhere in the Findings is there the slightest suggestion that the trial judge had in fact reached any conclusion as to why the Baxter plaintiffs had been denied those particular promotions.

The Court of Appeals, however, believed that the claims of four of the five Baxter plaintiffs[19/] were precluded by res judicata because of the district court's decision regarding classwide discrimination. At the time of trial these four plaintiff were in pay grades 6 or above, and both Cooper and the EEOC claimed and sought to prove that there was a general practice of promotional discrimination against blacks in those pay grades. The district court concluded that, other than regarding blacks in pay grades 4 and 5, "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief." (P.A. 194a). This holding cannot plausibly be read as a decision that there had never been any discrimination against

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19/ Baxter, Knott, Gilliam and McCorkle.

blacks above grade 5, or even that such discrimination had been particularly rare or unique. Since the district court in the same opinion also held that plaintiffs Cooper and Russell, both of whom were in grades 6 or above, "were discriminated against on account of their race" (P.A. 192a), its holding on the class claim cannot mean that there was no such discrimination in those grades. The only plausible construction of the court's decision is that acts of discrimination against employees in grades 6 and above were not sufficiently widespread to warrant a classwide remedy.

That the district judge's decision on classwide discrimination in grades 6 and above was not intended to resolve the particular individual claims of the Baxter plaintiffs, or of any other employees, was confirmed by the judge's subsequent

statements and orders. At the hearing on the application of the Baxter plaintiffs to intervene in Cooper, a question arose regarding whether the judge's prior decision on the class claim might somehow limit subsequent consideration of the individual claims. The trial court expressly rejected any such construction of its earlier decision:

> I'm not ruling that their rights are barred -- their individual rights to make individual claims are barred by res judicata. You can have several people who may be entitled to recovery without that evidence proving that there had been a classwide discrimination. 20/

In its order denying intervention, the district court explained that its earlier opinion had merely "found no proof of any classwide discrimination above grade 5....." (P.A. 287a).

20/ Transcript of Hearing of May 8, 1981, p. 20.

The distinction drawn by the district court between proof of classwide discrimination and proof of individual acts of discrimination is fully supported by the decisions of this Court. In Teamsters v. United States, 431 U.S. 324 (1977), the Court held that proof of a pattern or practice of discrimination requires more than proof of "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." 431 U.S. at 336. General Telephone v. Falcon noted that there is a "wide gap" between the occurrence of an individual act of discrimination and existence of a classwide discriminatory practice:

> Even though evidence that [a minority employee] was passed over for promotion when several less deserving whites were advanced may support the conclusion that [the employee] was denied the promotion because of his national origin, such evidence would not necessarily justify the additional

> inference ... that this discriminatory treatment is typical of [the employer's] promotional practices....

457 U.S. at 157-58. This Court has consistently rejected efforts to treat the absence of classwide discrimination as if it were an affirmative defense to a claim of particular acts of discrimination. In Connecticut v. Teal, 73 L.Ed.2d 130 (1982), the Court explained:

> [p]etitioners seek simply to justify discrimination against respondent on the basis of their favorable treatment of other members of respondent's racial group.... It is clear that Congress never intended to give an employer a license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees group.

73 L.Ed.2d at 141-42. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978), emphasized that "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." 438 U.S. at 579.

The lower courts have repeatedly recognized that proof that there is no classwide discrimination does not preclude the possibility that there may have been individual instances of discrimination. In Dickerson v. United States Steel Corporation, 582 F.2d 827 (3rd Cir. 1978), the employer advanced the same argument offered by respondent here, insisting that the dismissal of a classwide claim barred subsequent individual lawsuits by class members. The court of appeals rejected that contention:

> The class claims were not examined as a mere aggregation of individual claims. ... Rather, the district court looked to statistical evidence offered to support the existence of a practice or pattern of discrimination.... The district court's finding of an absence of class-wide discrimination is not necessarily inconsistent with a claim that discrete, isolated instances of discrimination occurred.... Therefore, the court's decision as to the class-wide claims of discrimination does not, as a

> matter of res judicata, bar class members from asserting individual claims of personal discrimination. 582 F.2d at 830-31.

See also Harrison v. Lewis, 559 F. Supp. 943, 947 (D.D.C. 1983); Branham v. General electric Co., 63 F.R.D. 667 671-71 (M.D. Tenn. 1974); 18 C. Wright & A. Miller, Federal Practice and Procedure, § 4455, pp. 473-74 (1982). Several circuits have considered or upheld claims of individual class members or representatives despite holding that the evidence did not support a finding of classwide discrimination.[21/]

The distinction repeatedly recognized by this Court, and correctly applied by the district court in this case, does not recreate a situation similiar to the

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21/ See, e.g., Muskelly v. Warner & Swasey Co., 653 F.2d 112 (4th Cir. 1981); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267 (4th Cir. 1980).

"one-way" intervention which existed prior to the 1966 amendments to Rule 23. The actual decision at a stage I proceeding binds the plaintiff class as well as the defendant, and that decision has a similar impact on both parties. If the plaintiffs prevail at stage I of a bifurcated Title VII hearing, the finding of a classwide discrimination does not result automatically in the entry of judgment for each class member. Rather, that decision merely creates a rebuttable presumption, applied at the stage II remedy hearing, that each class member was the victim of discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 357-62 and nn. 45-46 (1977). The employer remains free to attempt to overcome that presumption and to prove that any particular class member was not such a victim. Franks v. Bowman Transportation Co, 424

U.S. 747, 773 and n. 32 (1976). Conversely, a stage I finding of no classwide discrimination has an unquestionable and comparable adverse effect on any class member thereafter seeking to litigate an individual claim of discrimination. Such a class member would ordinarily be barred by collateral estoppel from seeking to support his or her individual claim by offering proof of a general pattern or practice of discrimination. Branham v. General Electric Co., 63 F.R.D. 667, 671-72 (M.D. Tenn. 1974); see pp. 63-67, infra.

The opinion of the court of appeals suggests an alternative basis for its decision -- that the Baxter plaintiffs, having unsuccessfully sought to have their claims adjudicated in the Cooper litigation, are not entitled to renew that effort in another lawsuit. Such a rule is implied by the following passage:

> The plaintiffs seek to escape the bar created by the determination in the class action suit by arguing that they were prevented by the District Court in proving their individual claims in the class action trial. This argument would disregard the fact that the trial was bifurcated by agreement of the parties. (P.A. 179a-180a).

This argument seems to assert, and the bank appears to argue, that if the Baxter plaintiffs "lost" in Cooper in the sense that they merely failed to obtain a decision on the merits of their claims, such a "loss" precludes any further attempt to obtain a judicial determination of those claims.

Such a rule would be completely at odds with the long established principles of res judicata, which preclude litigation of only those claims previously resolved "on the merits". Kremer v. Chemical Construction Corp., 456 U.S. 461, 466 n. 6 (1982); Federated Department Stores, Inc.

v. Moitie, 452 U.S. 394, 398 (1981). In addition, such a rule would wreak havoc with the administration of Rule 23. Every class member would be forced to intervene to assure that his or her claim was not forfeited merely because a court failed to decide it. No competent plaintiff's counsel could ever again agree to the bifurcation of the trial of a class action, since bifurcation would carry with it an intolerable risk that the claims of class members would be lost merely because they were not resolved. In light of that danger, no conscientious district court, even at the urging of defense counsel, could ever order bifurcation.

The de facto abolition of bifurcation would impose an enormous administrative burden on the federal courts. The procedure expressly approved by this Court in Franks and Teamsters evolved, and has

gained widespread acceptance in Title VII class actions, because it greatly reduces the time needed to try such cases. As the lower courts are well aware, the trial of even a handful of individual claims of employment discrimination can be as time consuming as a trial to determine whether there is a classwide practice of discrimination affecting an entire plant. In the instant case, for example, the trial consumed a total of six days; of this period less than two days of testimony dealt with the class claim, and over four days of hearings concerned the individual claims of the named plaintiffs and several class members. Had each individual claim of every class member been presented, the trial would doubtless have lasted several months rather than a few days. A similar exponential growth in the length of all Title VII trials would be precipitated by

a rule that the failure of a court to find classwide discrimination at a stage I hearing automatically precludes litigation of all individual claims.

If such a rule was in fact applied by the court of appeals in this case, the notice actually sent to class members was fatally deficient. The notice advised class members

> [T]he judgment in this case, whether favorable or unfavorable... will include all class members; all class members will be bound by the judgment or other determination of this action. (P.A. 36a)

The unambiguous meaning of this notice was that the claim of a class member would be lost only if there were in fact a "determination" of that claim, and if that determination were "unfavorable." Nothing in the notice in any way suggested that a class member would somehow be "bound" because the court did not issue any "judg-

ment or other determination" regarding his or her claim.

The decision of the court of appeals to dismiss the claims of petitioner Harrison did not rest on the district court's disposition of the claim of classwide discrimination in grades 6 and above. Since Harrison held only a grade 3 position, the district court's decision regarding promotions out of the higher grades was not controlling. Neither the district court's Memorandum of Decision, Findings of Fact and Conclusions of Law, or Judgment contain any reference whatever to whether or not there was a pattern of discrimination in promotions out of grade 3. In holding that Harrison's claim was barred by res judicata, the court of appeals asserted that that claim "is precluded by our determination on this appeal that there was no practice of discrimination in pay grade

5 and below." (P.A. 179a).

But the phrase "in pay grade 5 and below" masks a critical distinction between the actual decision of the Fourth Circuit and the nature of Harrison's claim. The issue in fact considered and resolved by the court of appeals was only whether the district court erred in finding discrimination in promotions from grades 4 and 5; the district court made no finding about, and the court of appeals had no occasion even to consider, promotion practices affecting black employees in grade 3. It is clear that the court of appeals well understood that the only issue of classwide discrimination before it involved grades 4 and 5. In twelve different passages the court of appeals described the district court's finding of classwide discrimination, in every case noting that that finding concerned grades 4

and 5.[22] In the course of analyzing the evidence bearing on whether there was classwide discrimination, the court of appeals repeated on more than thirty occasions that the issue before it was the sufficiency of the evidence regarding grades 4 and 5,[23] emphasizing at one point, "[w]e are concerned solely with alleged discrimination in pay grades 4 and 5." (P.A. 99a). The appellate court's actual conclusion regarding classwide discrimination is equally unambiguous:

> [A] finding of either a prima facie case or of a pattern of class dis-

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22/ P.A. 7a, 15a, 25a, 26a, 27a, 28a, 34a, 55a, 104a, 123a, 124a n.40, 129a.

23/ P.A. 29a, 30a, 35a, 36a, 37a, 38a, 55a, 57a, 58a, 59a, 61a, 62a, 64a, 65a n.24, 70a, 71a, 72a, 77a, 78a, 79a, n.26, 80a, 82a, 93a, 99a, 103a, 104a, 105a, 108a, 110a, 111a, 113a, 114a, 116a, 117a, 122a, 124a, 126a, 127a, 128a.

> crimination in promotions out of pay grades 4 and 5 or a Finding of Fact of such a pattern is not supported by any substantial evidence..... We accordingly reverse the District Court's Findings and Conclusions of class discrimination in promotions out of pay grades 4 and 5.... (P.A. 128a-129a).

Nowhere in the appellate opinion is there the slightest suggestion that the panel was considering, or even aware of, any allegation in Cooper of classwide discrimination in promotions out of pay grade 3.[24/] Accordingly, nothing in that record can in any way foreclose consideration of Harrison's claim in the Baxter litigation.

(2) The District Court in Cooper Expressly Reserved the Right of the Baxter Plaintiffs to Bring This Litigation

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24/ The few references in the court's opinion to pay grade 3 contain no suggestion that the court believed there was any such allegation. (P.A. 3a, 30a, 37a, 98a, 118a, 153a).

The procedural history of this case presents an additional basis for rejecting the defendant's contention that the decision in Cooper requires dismissal of the complaint in Baxter. In opposing the attempt of the Baxter plaintiffs to intervene in Cooper, the defendant insisted that intervention was simply unnecessary since the Baxter plaintiffs were free to file their own lawsuit. In the Defendant's Response to Motion to Intervene, the bank argued:

> [A]pplicants ... can still go to the EEOC office and file all the charges they desire.... Therefore, there is no way there will be any prejudice to the applicants in denying their motion, since they can pursue any individual claims they have in separate proceedings. (P.4)

At the oral argument on that motion in the district court, the defendant reiterated this contention:

COURT: Mr. Hodges [counsel for defendant], are you saying that they could bring a separate suit within whatever the time would be following the dismissal of this case?

MR. HODGES: I believe they could if they wanted to pursue their individual claims and if the statute was tolled and whatever was not barred by the statute of limitations, then they could pursue separately....

* * * *

MR. HODGES: ... [T]hey could go file charges with the EEOC, file a case under 1981, but they could not participate any longer in this case. They are not entitled simply to go into Stage 2 to pursue their claims. They've got to do what any other Plaintiff with a complaint has got to do and that is go through the proper procedure.

* * * *

MR. HODGES: If they've got individual claims, let them file it. Let them go through the proper procedures.25/

A mere 55 days after thus insisting that the Baxter plaintiffs could and should file their own suit, the defendant moved to dismiss that lawsuit as barred by res judicata.26/ In the court of appeals the defendant expressly disavowed the position it had taken in Cooper, explaining "The Bank did at the time erroneously assert that individual claims could be pursued."27/ But having thus prevented the Baxter plaintiffs from litigating their claims in Cooper, the bank was necessarily

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25/ Transcript of Hearing of May 8, 1981, pp. 7, 8, 16.

26/ J.A 71a. The defendant's Motion to Dismiss was filed in Baxter on July 2, 1981.

27/ Reply Brief of Appellant, No. 82-1259 (4th Cir.), p. 2.

estopped from opposing the filing of the separate lawsuit which the bank itself had advocated.

The argument advanced by the bank in opposing the motion to intervene was expressly adopted by the district court in denying intervention. During the argument on that motion the district judge made clear that his decision in Cooper left the Baxter plaintiffs free to file a new action:

> COURT: Mr. Hodges is agreeing with [the plaintiffs] that ultimately they can all come in here. He says they are entitled to have the EEOC function in their cases before they have a standing to be in this case, and I think he's right.
>
> * * * *
>
> COURT: I'm going to deny the motion without prejudice to the individual rights of the four would be

> intervenors to maintain a separate action or to file a separate claim....
>
> MR. CHAMBERS [counsel for plaintiffs]: Your Honor, would that without prejudice be also with respect to their rights under 1981, because we will move tomorrow morning for a separate lawsuit.
>
> COURT: Sure, without prejudice to any rights they have under 1981 or under the Equal Employment Act.28/

The district court's order denying intervention emphasized:

> I see no reason why, if any of the would be intervenors are actively interested in pursuing their claims, they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week. (P.A. 288a).

28/ Transcript of Hearing of May 8, 1981, pp. 12, 17-18. (Emphasis added).

The district judge's decision is by itself dispositive of the res judicata defense. Res judicata is never applicable if a plaintiff's claim in an earlier action was rejected "without prejudice,"[29/] or if the court in the first action expressly reserved the plaintiffs right to maintain a second action.[30/]

29/ Restatement of Judgments, Second, §20(1)(b): "A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim ... (b) when ... the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice...." (1982).

30/ Restatement of Judgments, Second, §26(1)(b): "(1) When any of the following circumstances exists, the general rule .. does not apply to extinguish the claim and ... the claim subsists as a possible basis for a second action by the plaintiff against the defendant: ... (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action...." (1982).

III THE APPLICATION OF COLLATERAL ESTOPPEL TO THIS CASE

Although the rejection of a claim of classwide discrimination does not preclude the subsequent litigation of claims of individual class members, it will ordinarily restrict the evidence and issues on which such subsequent litigation may be based. "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." Montana v. United States, 440 U.S. 147, 153 (1979). As with res judicata, of course, the bar of collateral estoppel must be applied with care. "It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided

in the first proceeding and where the controlling facts and applicable legal principles remain unchanged." Commissioner v. Sunnen, 333 U.S. 591, 599-600 (1948). "If there be any uncertainty on this head in the record -- as, for example: if it appear that several distinct matters may have been litigated ... without indicating ... upon which the judgment was rendered -- the whole subject matter of the action will be at large...." Russell v. Place, 94 U.S. 606, 608 (1876).

With regard to petitioner Harrison, it is clear that nothing was litigated or decided in the Cooper litigation regarding whether or not the bank engaged in a pattern and practice of discriminating against blacks in promotions out of pay grade 3. Harrison should thus be free on remand to seek to prove, in support of his

individual claim, that such a pattern and practice existed.

The other Baxter plaintiffs, who are in pay grades 6 and above, are bound by the trial court's decision in Cooper that any pattern or practice of discrimination in those grades was not "pervasive enough for the court to order relief." But while it is apparent that this passage did not adjudicate the individual claims of any of the Baxter plaintiffs, it is unclear how widespread or uncommon the district court actually concluded discrimination was in those pay grades. A frequency of discrimination insufficient to justify classwide relief might still be adequate to provide significant evidentiary support for individual discrimination claims. Since the Baxter claims are to be tried by the same judge who decided Cooper, the district court will be in a position on remand to

resolve, based on the intended meaning of the original Cooper decision, the extent to which the Baxter plaintiffs may introduce, in support of their individual discrimination claims, evidence of alleged acts of discrimination involving other black employees in pay grades 6 and above.

The district court in this case found that the bank had engaged in intentional racial discrimination in denying promotions to two of the named plaintiffs, Sylvia Cooper and Constance Russell. (P.A. 192a-193a). It concluded in particular that Cooper, who was in pay grade 7, had been unlawfully denied a promotion to grade 8, while Russell, a grade 6 employee, had been illegally rejected for a promotion to grade 7. The court of appeals reversed both of these findings of discrimination. (P.A. 129a-171a). But the opinion and panel which overturned those findings also

erroneously assumed, as is apparent from the discussion of the Baxter plaintiffs, that the trial court had found there was no discrimination at all at the bank in grades 6 and above. The court of appeals' misreading of the district court's holding on the question of classwide discrimination in grades 6 and above necessarily tainted its rejection of the claims of Russell and Cooper that they were discriminatorily denied promotions out of grades 6 and 7 respectively. Accordingly, the Fourth Circuit's decision dismissing the claims of Cooper and Russell should be vacated and remanded for reconsideration in light of the correct construction of the trial court's decision on the classwide claims.

CONCLUSION

The judgment and opinion of the Fourth Circuit, insofar as they hold that the claims of the Baxter plaintiffs are barred

by res judicata, should be reversed. The judgment and opinion regarding plaintiffs Cooper and Russell should be vacated and remanded for further consideration in light of this Court's opinion.

Respectfully submitted,

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